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## **Late Sovereignty in post-integration Europe: Continuity and change in a constitutive concept**

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**Abstract**

This paper examines the state of sovereignty in post-integration Europe. Drawing on linguistic approaches to law and IR, it interrogates Neil Walker's conception of 'late sovereignty', in terms of how it manages the problem of continuity and change in concepts in transition as well as the constitutive and regulative rules of late sovereignty games. The transition from what the paper calls 'high sovereignty' to 'late sovereignty' entails a broadening of the range of actors who play late sovereignty games to include non-sovereign state entities such as the EU, a redefinition of the 'particularising' element of ultimate authority from territory to function, and an evolution of the criteria for what constitutes a 'good' sovereignty claim as stipulated by the regulative rules of late sovereignty games. It concludes by assessing the relevance of late sovereignty for the trilateral relationship between the non-continental territories of EU Member States, the Member states themselves and the EU.

**Keywords**

Sovereignty, post-integration Europe, EU

## **Late Sovereignty in post-integration Europe: Continuity and change in a constitutive concept**

### **1. Introduction**

International cooperation is not traditionally considered a threat to state sovereignty. Indeed it has been frequently argued that the ability to establish and maintain international relations is the very expression of sovereign status. (Waeber 1995: 420). This is the case even where post-state institutions have been established, charged with formulating and executing policy decisions. (Lake 2007) However, the process of European integration, as a form of international cooperation as overseen by the institutions of the European Union (EU), presents a challenge the sovereignty of EU Member States (MS). This is due, it is submitted, to two particular features of European integration which distinguish EU membership from more traditional forms of international cooperation; constitutionalism and majority decision-making.

Constitutionalism relates to the collection of legal doctrines developed by the EU's judicial arm – the European Court of Justice (ECJ) which resulted in its legal order evolving from a treaty under international law to an autonomous hierarchical legal order such that EU law became the 'law of the land' (Weiler 1991: 2415) in each of the EU's MS. From the point of view of the sovereignty of EU MS, perhaps the most significant feature of this development was the supremacy doctrine, where national law, even national constitutional law, was to be subjected to the provisions of EU law in cases of conflict. (ECJ 1964) This doctrine challenged the legal supremacy of national constitutions as well as the political competence of national administrations whose activities would be now be subject to the provisions of EU law as enforced by domestic courts.

Secondly, in relation to political decision-making by the EU institutions, the loss of a veto by individual MS governments in the Council (the upper chamber of EU government representing the interests of MS) is the second significant feature of European integration that raises challenges to conventional understandings of sovereignty. (Keohane 2002: 748) From an early stage in European integration, the requirement of unanimity for voting in the Council of Ministers, where each MS has equal representation, was dispensed with such that EU MS were bound by decisions of law and policy, even where they explicitly voted against it.<sup>1</sup>

## **2. Whether Sovereignty?**

Harbingers of the demise of sovereignty are not new. However, given the novelty and invasive nature of European integration as a form of international cooperation, it is perhaps unsurprising that the experience of European integration has resulted in a renewal of the prophecy of the death of sovereignty. Notwithstanding the challenges European integration poses to the concept of sovereignty and the sovereignty of EU MS, sovereignty remains central to understanding European integration even if only to emphasize its irrelevance to the EU context. (Mac Amhlaigh 2009: 555).

It is premature to conclude with MacCormick that some fundamental epistemic shift has taken place beyond understandings of sovereignty in legal and political practice in Europe from sovereignty to post-sovereignty. (MacCormick 1993) Such a position ignores the significance of sovereignty as the 'object language' (Walker 2003: 10) of domestic politics and its important role as a 'bargaining resource for transnational politics' (Keohane 1994) even in post-integration Europe.<sup>2</sup>

Even if sovereignty can still be said to be relevant in the post-integration European context, however, it is also difficult to affirm with the liberal intergovernmentalists that European integration is simply another form of (sovereignty preserving) international cooperation (Moravcsik 1998). The sheer breadth of national policies which owe their origins to policy formulated at the EU level, combined with the considerable autonomy of EU institutions and the invasive nature of EU law, render the claim that European integration is simply 'business as usual' in terms of international cooperation, increasingly hollow.

Thus, rather than being redundant or remaining unchanged, sovereignty has evolved, where it still retains its purchase on law and politics (both national and supranational) but not in the form which it has taken in its hey-day of the Westphalian system of sovereign states. In order to appreciate precisely how sovereignty has changed in the European integration experience, some conceptual ground clearing is in order to understand continuity and change in what is a 'polysemous' concept. (MacCormick, 2011).

Following the 'linguistic turn' in International Relations (Aalberts 2004a) and (notably earlier) in jurisprudence (Hart 1994), the conception of sovereignty advanced in this contribution is that of a politico-legal concept which is an 'institutional' rather than a 'brute' fact. (Searle 1969: 50).

The positing of sovereignty as a linguistically constituted institutional fact precludes a rigid conceptual analysis of the fate of sovereignty in European integration. As Bartelson notes,

such an approach would entail ‘identifying a class of properties as “essential” to statehood, thus demarcating “sovereignty” from deviant cases and eliminating obnoxious borderline cases by searching for ever more fine-grained qualitative difference. The desired outcome is a clarified concept, evident in its logical purity and the by the empirical givenness of its referent’ (Bartelson: 1995, 27). The problem with this approach is that it falls foul of the ‘descriptive fallacy’ that sovereignty corresponds to some objective reality whose meaning is fixed in all times and places. As an institutional fact, sovereignty does not relate to an empirically observable phenomena of power, but is rather a normative concept whose existence is contingent upon its usage or, more specifically, the rules governing its usage, in practice. (Werner & de Wilde 2001; Aalberts 2004a). Given that the meaning of sovereignty is contingent upon its usage in ‘sovereignty games’<sup>3</sup> as prescribed by the rules of these games, its meaning, like the rules of language games, are subject to change and evolution. They are not inexorable but are rather, in Wittgenstein’s sense, customary (Wittgenstein 1968: PI, 198).

As with all language games, sovereignty games contain rules that are central to the intelligibility of the practice *qua* sovereignty game. (Wittgenstein 1968: P 85). Moreover, following Searle’s refinement of rules and languages games, sovereignty games entail both constitutive and regulative rules (Searle. 1969).<sup>4</sup> The former are constitutive of the practice itself in that they not only constitute the actors or participants in the practice, but also in the sense that they enable participants and observers to understand that a particular game, such as chess or football, is being played. The regulative rules, on the other hand, stipulate criteria for the execution of the practice constituted by the constitutive rules such as prescribing ways in which the practice can be undertaken and establishing criteria for engaging well in the practice. (Lindahl & Van Roermund 2000).

It is in this respect, it is argued that the EU sovereignty experience is best understood. It is not irrelevant as the post-sovereignists claim, but nor has it remained fixed; rather as with all linguistically-based concepts, it has evolved through the playing of sovereignty games from what can termed ‘high sovereignty’<sup>5</sup> characterized by the Westphalian system of sovereign states, to what Neil Walker has dubbed ‘late sovereignty’. (Walker 2003, 2008a, 2008b, 2010).

In the remainder of this contribution, the contours of late sovereignty in the EU context will be explored, with particular reference to the evolution of the constitutive and regulative rules of late sovereignty games and how they compare with those of ‘high sovereignty’ games. It concludes by analyzing how the evolution of sovereignty from its high to late phases can

shed light on the trilateral relationship between Overseas Countries and Territories of EU MS (OCTS), their metropolises, that is, EU MS and the EU itself.

### **3. From High Sovereignty to Late Sovereignty**

The form of sovereignty which has dominated international law and international relations in modern history is high sovereignty characterized by the Westphalian state system where sovereignty and statehood were synonymous. According to Krasner, the era of high sovereignty can be traced back to the mid-1700s.<sup>6</sup>

The constitutive and regulative rules of these high sovereignty games are reasonably well understood. Following Searle's formulation of institutional facts as 'X counts of Y in context C', (Searle 1969: 35) and emphasizing the constitutive function of the rules in constituting the actors in the game, Werner and de Wilde posit the constitutive rules of high sovereignty games in the following formulation: a 'political collective (X) counts as a state (Y) in the context of a sovereignty discourse (C)', where a claim to sovereignty 'attempts to establish a relation as an institutional fact ... and a set of right and responsibilities'. (Werner & deWilde 2003; 292). These rights and responsibilities are a combination of what Krasner has termed Westphalian and International Legal Sovereignty (Krasner 1999: 9) expressed in terms of internal ultimate authority over territory and people and external equality.

Moreover, the regulative rules of these high sovereignty games evolved from the earlier justifications of absolute monarchy and imperial conquest to claims of nationhood, popular sovereignty and the right to self-determination. (Werner & deWilde 2001: 295). The post-war proliferation of post-state institutions and legal regimes such as the UN and GATT, as well as phenomena such as globalization, has provoked a rethink of the high sovereign era and its characteristic sovereign state system. (Falk 2002). This trend has been most intense in Europe and Neil Walker's conception of late sovereignty provides an attempt to give an account of the post-high sovereignty era in the light of European integration. (Walker 2003, 2008a, 2008b, 2010). As Walker argues, late sovereignty entails a number of features in the discursive career of the concept of sovereignty 'continuity, distinctiveness, irreversibility and transformative potential. (Walker 2003: 19).

The balance between continuity and change, or as Walker terms it, continuity and distinctiveness, is crucial to the evolution of the concept of sovereignty and the move from high to late sovereignty in the post-integration European experience. The meaning of sovereignty from its 'high' period must retain some purchase in late sovereignty games such

that they can be cognized as *sovereignty* games. As such, the practices of late sovereignty in European integration must be *intelligible* as a form of sovereignty game and not something else; that is not, for example, *post-sovereignty* where the practices can be understood as not-sovereignty games, in the same way that throwing chess pieces around the room can be understood as not-chess playing. Thus, late sovereignty cannot be a negation of sovereignty.<sup>7</sup> Therefore, the important element of *continuity*, which is central to the intelligibility of post-integration European late sovereignty games, features in Walker's account of late sovereignty in terms of the idea of *ultimate authority*. By retaining a 'focal meaning' (Finnis 1980: 9) of sovereignty as a form of ultimate authority, Walker argues, the 'deep conceptual structure of sovereignty' is preserved. (Walker 2003: 23)

With regard to the *change* side of the equation, the evolutionary element of *late* as opposed to high sovereignty, features in a number of respects in late sovereignty. First of all, as noted, in high sovereignty games, the 'particularizing' element of the ultimate authority claim related to territory and people. In late sovereignty games, however, the limiting element of sovereignty and the demarcation of one sovereign claim from another, relates, not spatially, that is not to territory, but rather to *function*. (Walker 2003: 22). Thus in late sovereignty autonomy does not imply territorial exclusivity. Post-integration Europe constitutes a landscape of functionally differentiated late sovereignty claims which do not impugn the integrity of other claims. A corollary of this is that in late sovereignty games the hegemony of states in sovereignty games has been challenged. In late sovereignty games, the range of participants has expanded to include polities which do not fit the classic state model such as the EU. This, therefore, allows for the mutual late sovereignty claims of the EU *and* Member States, and does not result in a zero-sum resolution of sovereignty at either level, national or supranational. In terms of the constitutive rules of late sovereignty games, then, late sovereignty can be said to relate to an *institutional plausible claim* (X) to ultimate authority over a specific functional domain (Y) in the context of a supranational political discourse (C). Moreover, in late sovereignty games, the criteria stipulated by the regulative rules have expanded beyond the traditional canons of high sovereignty games. Whereas, the tropes of high sovereignty games are still present in late sovereignty games (see below), other justifications for sovereignty claims not based on ideals of popular sovereignty or constituent power have been added. Thus, the late sovereign claim to ultimate authority over a particular functional domain can, itself, be justified on functional grounds as a form of what Fritz Scharpf has termed 'out-put legitimacy'. (Scharpf 1999).



#### 4. EU Late Sovereignty Games in Practice

The evolution of the rules of sovereignty games from high to late can be seen in the claims made at both the supranational and national levels in the context of the European integration process. For example, the ECJ's claims to the direct effect and primacy of EU law are characteristic of late sovereignty claims in the sense that they are made not by a nation state but a supranational institution and constitute a claim to functional autonomy based on consequentialist or out-put considerations. In constitutionalizing the EU Treaty system, the Court made a claim to ultimate authority over the functions governed by EU law by claiming that:

'the ... Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... [t]he Community constitutes a new legal order ... for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only their Member States but also their nationals'. (ECJ 1963: 12.)

This was complemented in the subsequent *Costa* judgment with a claim to the *autonomy* of the EU legal order, resulting in its primacy over national law. (ECJ 1964: 594). In this case the Court claimed that accession to the (then) Community constituted a 'permanent limitation' of EU MS sovereign rights (ECJ 1964: 594), the implication being that the EU was now sovereign in the areas where the MS's sovereign powers had been limited.

In developing the doctrine of the direct effect and primacy of EU law, the Court justified this sovereignty claim not on ideas of a constituent power, nor on the right to the self-determination of an EU people, but in true late sovereign fashion, on *functional* grounds. In *Costa*, the Court found that unless the legal system enjoyed ultimate authority over its functional domains that 'the realisation of the aims envisaged by the Treaty' would be endangered (ECJ 1964: 455) and that the effectiveness of EU law would be impugned. (ECJ 1964: 456). These early cases constitute the foundational iterations of the EU's late sovereignty claims over the past fifty or so years of its operation. A more recent and prominent iteration was the Court's decision in *Kadi*. (ECJ 2008) The case involved a complex clash of the UN and EU legal orders with respect to provisions for the freezing of assets associated with terrorist financing. In finding that the EU measure which implemented the UN Security Council decision regulating terrorist financing violated fundamental rights protected by the EU legal order, the Court stressed the autonomy of the EU's legal order finding that it constituted an '*autonomous* legal system which is not to be prejudiced by an international agreement'. (ECJ 2008: 316). This rather robust claim to the autonomy (and

therefore ultimate authority) of the EU legal order was made, not as against the legal orders of EU MS which was the case in *Van Gend* and *Costa*, but outwardly towards the legal order of the United Nations and the international community. Moreover, the justification of this late sovereignty claim in *Kadi* was not precisely the same as that in these earlier cases. In *Kadi* this late sovereignty claim was based, not only on the achievement of the aims of the treaty as in *Costa*, but also on the ‘principles of liberty, democracy and respect for human rights and fundamental freedoms’ embedded in, and protected by, the EU’s (autonomous) legal order (ECJ 2008: 303).<sup>8</sup>

Even if the actors of high sovereignty games i.e. states also play late sovereignty games and justify their claims according to the tenets of high sovereignty, they have not remained unaffected by the evolution from high to late sovereignty. The sovereignty claims of EU MS in the context of European integration, it is argued, are representative more of late than high sovereignty games.

Firstly, unqualified and categorical assertions of ultimate authority over territory and people by EU MS have tended to be replaced by more temperate claims of residual authority in late sovereignty games, which take into account the MS’s commitments to European integration. (Kumm 2005) In terms of the conventional justifications proffered by particular MS in high sovereignty games, moreover, these have undergone a transition from one form of high sovereignty justification to another form in that member state due to the integration process. Two examples from EU Member States illustrate this point; the German Federal Constitutional Court’s (GFCC) ‘Lisbon decision’ of 2009, and the UK’s European Union Act of 2011.

In June 2009, the GFCC handed down its decision on a challenge to German ratification of the Lisbon Treaty of 2008. (GFCC 2009) The Court found that such ratification would not *per se* violate the German basic law. In doing so, it asserted German sovereignty at various junctures in the judgment accompanied by justifications of its sovereignty claims by reference to the classic tropes of high sovereignty such as constituent power, popular sovereignty and self-determination (GFCC 2009: para. 204, 223, 310). These uses of high sovereignty justifications for German sovereignty by the GFCC are, by themselves, unremarkable. However, what characterizes them as late, rather than high sovereignty claims, it is submitted, is the particular context within which these justifications were put forward; namely the post-war German state. In the reconstruction of post-war Germany, and particularly in the drafting of the basic law, the previously unhappy experiences with popular sovereignty were suppressed in favour of a strong assertion of the rule of law and the

supremacy of the basic law over the political process. This was copper-fastened in the basic law itself through an absolute prohibition on the holding of referendums or plebiscites, (Mollers 2006) and it was explicitly recognized by the GFCC itself in the Lisbon decision where it found that:

‘The Basic Law’ ... breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20<sup>th</sup> century regarded the right to wage war – even a war of aggression – as a right due to sovereign state as a matter of course’ (GFCC 2009: para. 199).

Thus, the post-war German constitutional landscape was marked by a prominent and well-respected constitutional court, which regularly struck down the laws of the *Bundestag* for violating the provisions of the German basic law. (Kommers 1997). Thus, post-war German sovereignty was grounded less on constituent power and popular sovereignty as expressed through the use of referendums and more on a ‘constitutional patriotism’ (Habermas 1998) with a ‘sovereign’ basic law.<sup>9</sup> Against this background the justificatory claims of German sovereignty in the Lisbon decision, based on popular sovereignty, a German constituent power and self-determination mark a shift from the constitutional patriotism which has underpinned and justified German sovereignty in the post-war era.

Unlike the post-war German experience, the UK constitutional tradition prioritizes the political institution of Parliament over the written law through the foundational doctrine of Parliamentary Sovereignty, which has become both the claim and justification of UK sovereignty in the high sovereignty period. (Goldsworthy 1999). Thus the ‘high sovereignty’ claims of the UK have taken the form of expressions of parliamentary sovereignty, justified by reference to its ‘facticity’ whether historical or political. (Wade 1955: 157-8).

However, the justification of Parliamentary sovereignty in UK constitutional discourse has been undergoing a shift in the past decade or so due, *inter alia* to the European integration project, marking the passage from high sovereignty to late sovereignty in the UK. Firstly, judicial pronouncements, most notably from the UK’s former highest court, the House of Lords,<sup>10</sup> have suggested that the justification of parliamentary sovereignty is not based on its (circular) ‘facticity’ but rather on its acceptance by the common law. (House of Lords 2005) However, perhaps more significantly, the European Union Act 2011 illustrates the passage from high sovereignty to late sovereignty in the UK context.

Two features of the Act, in particular, provide evidence of this. Firstly, s. 18 of the Act, the ‘sovereignty clause’, states, in paradigmatic late sovereignty mode, that EU law ‘falls to be recognised and available in law in the United Kingdom only by virtue of Acts [of

Parliament].’ (UK Parliament 2011: s. 18). Secondly, and more strikingly from the point of view of the transition from high to late sovereignty games, are the series of referendum locks which are contained in the Act itself. For example, s. 2(2) of the Act provides that EU Treaties shall not be ratified by the UK unless a referendum has been held approving the reforms. The referendum locks mark an assertion of UK sovereignty claims in the sense that they require that all Treaty amendments are subject to a national referendum approving the changes. However, what makes this a late rather than a ‘high’ sovereign claim is the way in which it marks a shift in the foundation and justification of UK sovereignty, from Parliamentary sovereignty to popular sovereignty. Constitutionally speaking, the referendum requirements seem to suggest a shift in conceptions of Parliamentary sovereignty from a ‘continuing’ to a ‘self-embracing’ form (Hart 1994: 149) which would seem to be supported by recent judicial attitudes to Parliamentary sovereignty. However, perhaps more strikingly from the viewpoint of the regulative rules of UK sovereignty, the introduction of referendum requirements such as that of s. 2(2) seem to suggest a shift in justification of UK sovereignty, from the *fact* of parliamentary sovereignty to popular sovereignty. This shift is all the more apparent given that popular sovereignty and constituent power as a justification of UK sovereignty has been virtually absent in UK constitutional discourse for the majority of the ‘high sovereign’ period (Loughlin 2006).

In sum, in the playing of late sovereignty games in the European integration context we can see how the constitutive and regulative rules of late sovereignty are followed by the participants. The late sovereignty claims of the EU reflect the evolution of the constitutive rules of high sovereignty games albeit that the focal meaning of sovereignty is retained in its sense of ultimate authority over particular functional domains. Moreover, the evolution of the regulative rules of late sovereignty games are apparent in the fluidity of the justification of functional autonomy, both at the EU but also the MS level as seen in the examples from the UK and Germany.

## **5. Late Sovereignty Games and OCTs**

What light can European late sovereignty games shine on the trilateral relationship between OCT, metropole and EU? As the introduction to the study explains, OCTs are non-continental colonial territories of EU Member States which have resisted the urge to assert independence in the post-war era of decolonization for economic, political and geographic reasons.<sup>11</sup> As well as this, the EU itself has a stake in OCTs as specifically provided for in

various EU treaty provisions, which make special exemptions and provisions for these territories from *inter alia* the rules governing the single market.<sup>12</sup> These exemptions and concessions are regulated at the EU level making the EU a significant actor in the governance of these territories. As the editors state, this results in a trilateral relationship between OCT, MS and the EU, with post-colonial relevance.

In terms of the agency of the OCTs themselves, they are, perhaps, best characterized by their reluctance to play *high* sovereignty games, that is claiming ultimate authority over a particular territory (usually islands) and people based on regulative rules such as the right to self-determination.<sup>13</sup> Therefore, the late sovereignty games paradigm in the EU context may open up a space for OCTs to make *late* sovereignty claims regarding particular functions without resulting in independence (and therefore abandonment by the metropole) which would result from making high sovereignty claims. As discussed in the previous sections, the characteristics of late sovereignty games include the agency of actors as participants in late sovereignty games which do not fit the mould of sovereign statehood. Therefore like the EU, OCTs as non-sovereign state actors can play *late* sovereignty games making claims to functional autonomy rather than territorial exclusivity.

Moreover, as noted above, the disjunction between sovereignty and statehood in late sovereignty games is accompanied by a broadening of the repertoire of justifications for late sovereignty claims such as the functional and normative justifications of EU sovereignty by the ECJ. This expansion of the repertoire of regulative criteria for late sovereignty claims as compared with high sovereignty claims, means that there are more options available to OCTs to substantiate their late sovereignty claim to functional autonomy beyond the high sovereignty form of popular sovereignty and self-determination (providing the foundation for the undesired goal of independence). Thus, the functional autonomy of OCTs can be justified according to the 'special status' of these territories predicated on functional justifications including geographic, demographic and economic factors which have been formally recognized at the EU level, such as Articles 198 and 349 of the Treaty on the Functioning of the European Union.<sup>14</sup>

What results when applying the paradigm of late sovereignty games to the trilateral relationship between OCT-metropole-EU, then, is a 'variegated federal landscape of governance' (Baldacchino current volume: pp?) where ultimate authority claims based on functional autonomy are made at different levels of the trilateral relationship. Thus, the multi-level governance resulting from the playing of late sovereignty games in the trilateral relationship is a vindication, rather than the negation, of the role and relevance of sovereignty

in post-integration Europe (Aalberts 2004b), even if only one of the participants in these sovereignty games fits the typology of agency in high sovereignty games.

## 6. Conclusion

In this contribution, the EU sovereignty experience was analysed through the notion of late sovereignty. If ‘high sovereignty’ dominated the sovereignty games of the past two hundred years or so, then the post-war experience of European integration can be said to mark the transition from high sovereignty to late sovereignty. Neil Walker’s account of late sovereignty was then unpacked in order to understand both how late sovereignty remains a conception of *sovereignty* and not post-sovereignty, as well as analysing precisely how the constitutive and regulative rules of late sovereignty games differ from those of high sovereignty. This paradigm of late sovereignty was then illustrated by reference to sovereignty claims made within the EU context by EU MS as well as the EU itself. It was argued that the late sovereignty paradigm is also a better way of understanding the complex trilateral relationship between OCTs, the metropole and the EU, as late sovereignty claims do not imply statehood and autonomy can be asserted in ways which do not imply or lead to statehood. In conclusion, sovereignty is alive and well in twenty first century Europe even if the dominance of the state is in decline.

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<sup>1</sup> Majority voting was introduced in 1966 as part of the 'third stage' of the transitional development of the then European Economic Community. This development was not unproblematic and gave rise to the empty chair crises and the Luxembourg compromise. (Teasdale, 1993) Nonetheless, majority voting has been applied to ever-wider policy areas in the form of qualified majority voting such that it is now the primary method of decision-making at EU level. (Christiansen & Reh 2009)

<sup>2</sup> As much was clear from the ratification debates of the Constitutional Treaty in France and the Netherlands and the Lisbon Treaty in Ireland. It would be simplistic to conclude that concerns over national sovereignty was the cause of the failure to pass the referendums in these cases, however, sovereignty was certainly prominent in the debates. For the Irish context, see (Laffan 2008).

<sup>3</sup> The notion of 'sovereignty games' is reasonably well understood in IR literature (Jackson 1990), (Sorenson 1999). However, as Werner and de Wilde point out, much of the literature on sovereignty games presupposes the state as an immutable fact. (Werner & de Wilde: 2001, 291-292) The notion of sovereignty as an institutional fact, however, presupposes the inverse, that the games *qua* discourse constitute the actors engaged in the game. As Aalberts puts it '... the rules ... constitute the fact, - they are the *conditions of possibility* of the very activity, which could not happen or 'be' except for the defining rules (as set out by language).' (Aalberts 2004a: 249).

<sup>4</sup> 'I want to clarify a distinction between two different sorts of rules, which I shall call *regulative* and *constitutive* rules ... As a start, we might say that regulative rules regulate antecedently or independently existing forms of behavior; for example, many rules of etiquette regulate inter-personal relationships which exist

independently of the rules. But constitutive rules do not merely regulate, they create or define new forms of behavior. The rules of football or chess, for example, do not merely regulate playing football or chess, but as it were they create the very possibility of playing such games.’ (Searle 1969: 33)

<sup>5</sup> Following the periodization of history such as, for example, the early, high and late middle ages.

<sup>6</sup> Krasner attributes the introduction of idea of the equality implicit in international legal sovereignty to Emmerich de Vattel and particularly his *Le droit de gens* of 1758. Westphalian sovereignty, on the other hand, relating to internal autonomy, has, Krasner argues, virtually nothing to do with the eponymous Peace of Westphalia of 1648. The principle of the internal autonomy of states was not clearly articulated until the eighteenth century by Wolff and Vattel. (Krasner: 1999, 14-20).

<sup>7</sup> In this regard, notwithstanding the evolutionary potential of *all* language games, particularly on Wittgenstein’s scheme, the language game of late sovereignty must retain some basic idea of what sovereignty means such that it can be understood that sovereignty games are still being played. Thus, even if we accept that the meaning of language is conventional and not essential, as well as the fact that it is evolutionary, both with reference to its constitutive and regulative rules, if language is to perform its primary function, that of *communication*, then the *meaning* or *intelligibility* of speech acts must retain some sort of central or ‘focal’ meaning. If the meaning of concepts is constantly up for grabs, then communication through language becomes impossible. I understand Cavell to be making a similar argument to this. (Cavell 1958).

<sup>8</sup> For discussion see (Mac Amhlaigh 2011).

<sup>9</sup> This is perhaps most evident in the GFCC’s ‘battles’ with the ECJ over fundamental rights protection in the EU legal system; the so-called ‘solange’ case law where the Court deferred to the jurisdiction of the ECJ as long as it deemed the protection of fundamental rights in EU law to be the equivalent of that of the German basic law. The assertion of sovereignty in this case, it is submitted, being the sovereignty of the German basic law over EU law. See (Kumm 1999)

<sup>10</sup> In 2009, the UK Supreme Court replaced the Judicial Committee of the House of Lords as the highest Court in the UK pursuant to the reforms of the Constitutional Reform Act 2005.

<sup>11</sup> See the introduction and Baldacchino’s introduction to the current volume.

<sup>12</sup> For a clear example of this in the context of EU financial regulation, see Vlcek’s contribution to the current volume. More generally see (Ziller 1999) and (Kochenov 2009).

<sup>13</sup> For discussion, see Baldacchino’s contribution to the current volume.

<sup>14</sup> Article 198 of the TFEU provides that ‘ the Member States agree to associated with the Union the non-European countries and territories which have special relations with Denmark, France, the Netherlands and the United Kingdom [listed in an Annex to the Treaty] ... The purpose of association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Union as a whole. In accordance with the principles set out in the preamble to this Treaty, association shall serve primarily to further the interests and prosperity of the inhabitants of these countries and territories in order to lead them to the economic, social and cultural development to which they aspire.’ More strikingly in this regard, Article 349 TFEU provides that: ‘Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament. The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes. The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.’